No. 62.

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Supreme Court of the United States.

OCTOBER TERM, 1900.

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No. 62

H. ABRAHAM & SON AND OTHERS, PLAINTIFFS IN ERROR,

vs.

MARIE L. CASEY, ADMINISTRATRIX OF THE SUCCESSION OF LAURENT LACASSAGNE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

BRIEF FOR PLAINTIFFS IN ERROR.

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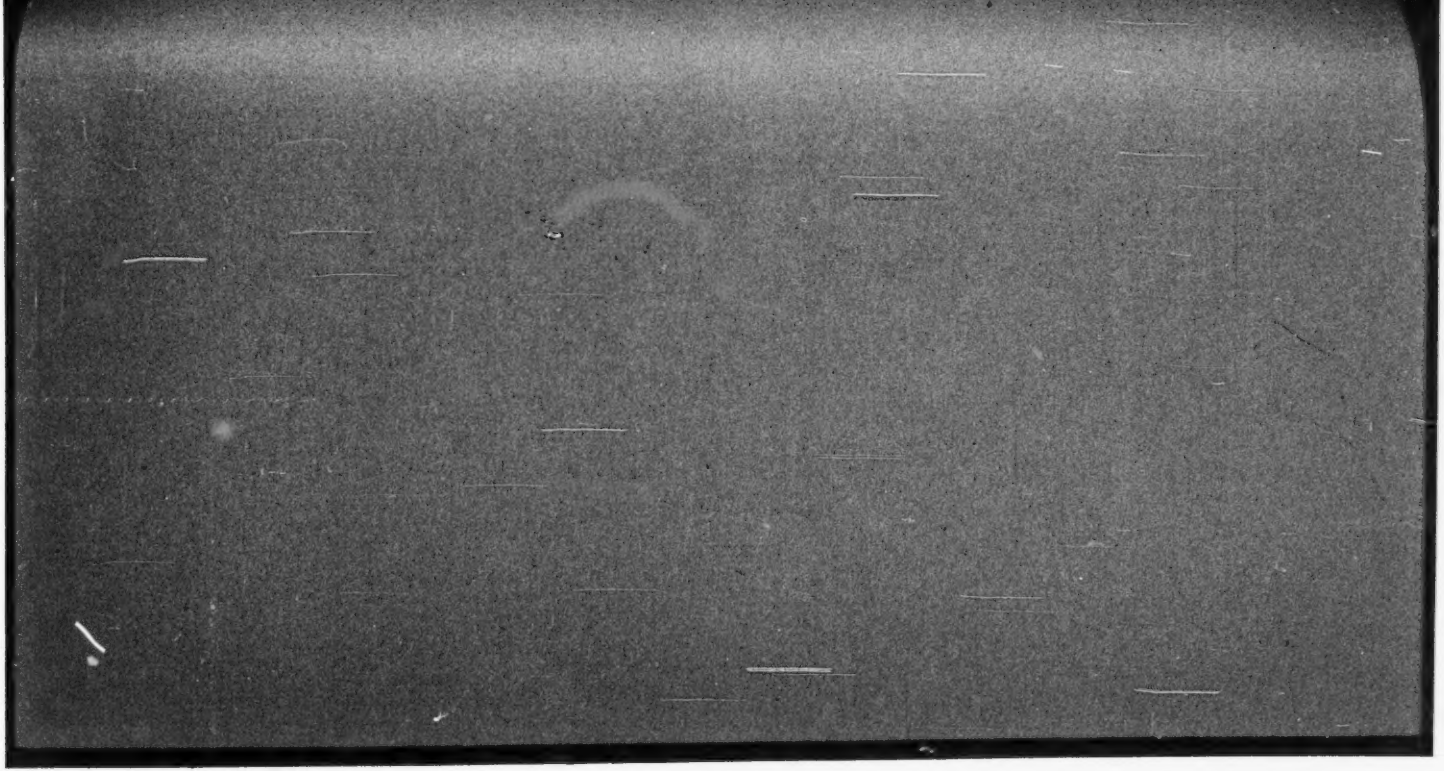

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 301.

H. ABRAHAM & SON AND OTHERS, PLAINTIFFS IN ERROR,

vs.

MARIE L. CASEY, ADMINISTRATRIX OF THE SUCCESSION OF LAURENT LACASSAGNE, DECEASED.

IN ERROR TO THE SUPREME COURT OF THE STATE OF LOUISIANA.

Brief for Plaintiffs in Error.

FEDERAL QUESTION.

The federal question set up and presented in the record is the refusal of the Supreme Court of Louisiana to give due effect to certain decrees of the Circuit Court of the United States for the Western District of Louisiana, one of which is supported and sustained by the decree of this Court.

STATEMENT.

This is a suit in revendication by Laurent Lacassagne to establish his title to a certain plantation in the Parish of Vermilion, Louisiana, and to enjoin plaintiffs in error from enforcing a certain judgment by seizure and sale of the plantation.

At the time this suit was instituted, the plaintiffs in error, H. Abraham & Son, had brought and prosecuted to final judgment a suit for the enforcement of certain acts of special mortgage by one Chapuis, embracing the plantation here in question, and securing thereon debts due by Chapuis, amounting, in the aggregate, to $3,572.02, with interest (pp. 67–97). To enforce the judgment thus obtained, the sheriff of the Parish of Vermilion levied an execution on the said plantation, and advertised it for sale.

To prevent this threatened sale, Laurent Lacassagne, whose administratrix is the defendant in error, instituted these proceedings against Abraham & Son and Chapuis in the 17th Judicial District Court, Parish of Vermilion, claiming in his petition to be the absolute owner of the plantation, and praying that the sale might be perpetually enjoined, and that the land in question might "be decreed to be the property of petitioner, free from any incumbrance created by the said Chapuis, and be ordered restored to his possession, and that the said Abraham & Son be authorized to pay petitioner the said sum of one thousand dollars damages, as well as the costs of this suit" (pp. 1–3).

Lacassagne subsequently filed a supplemental petition making additional parties (pp. 11, 12), which, however, was afterwards withdrawn (p. 13).

According to the petition of Lacassagne, Chapuis, the author of the said mortgages, never had a *scintilla* of interest in the plantation which, he avers, was about to be sold for a stranger's debts.

To this extraordinary position, that plaintiffs in error lent Chapuis over three thousand dollars of their money on the faith of mortgages *resting on nothing*, they reply, *inter alia*, that Lacassagne is judicially foreclosed and estopped, by the decrees aforesaid, to set up any claim to ownership of the property, and to that end, Chapuis and Abraham & Son each filed a peremptory exception of *res judicata* (pp. 4, 5, and 7, 8).

Chapuis also intervened as testamentary executor of the Widow Cavé, adopting the peremptory exception of *res judicata*, by him theretofore filed individually, and relying on the same in opposition to the petition of Lacassagne (p. 6).

The facts necessary to understand the federal question, involved in these exceptions of *res judicata*, are, as follows:

The land or plantation in question belonged to the community that formerly existed between Jean Baptiste Cavailhez, and his wife, Jeanne Caroline Cavé, who were married in France and were citizens of that country.

The wife, having been abandoned by her husband, continued to reside in France, while the husband took up his residence in Louisiana and, after acquiring said plantation, lived thereon with his natural daughter, Marcelline, the fruit of an adulterous intercourse with one Ernestine Diaz.

Marcelline married one C. H. Remick, and on August 19, 1869, Jean Baptiste Cavailhez and the woman Ernestine Diaz passed an act of sale of the plantation to C. H. Remick (pp. 16, 17).

At the same time and place, there was executed a marriage contract between said Remick and said Marcelline, in which act the said Jean Baptiste Cavailhez and the woman, Ernestine Diaz, who were also parties to it, settled on said Marcelline a promissory note for $7,000, given by said Remick as part of the stipulated purchase price of $15,000 for said plantation (pp. 18, 19).

Jean Baptiste Cavailhez having died some time in April, 1882, his widow, Jeanne Caroline Cavé filed a bill in equity, averring herself to be a citizen of France, in the Circuit Court of the United States for the Western District of Louisiana against Marcelline Cavailhez, widow of C. H. Remick, deceased, in her own right and as tutrix of her minor children, and as tutrix administering the estate of said Remick, deceased, citizens of the State of Louisiana (pp. 178–180).

The bill alleged that complainant was lawfully married to Jean Baptiste Cavailhez, on December 10, 1833:

That during the existence of the marriage her husband purchased the plantation and other property, which was subject to a tacit mortgage to secure the reimbursement of all moneys received for her and from her by him and converted to his own use:

That while he was her lawful husband, Jean Baptiste Cavailhez contracted an unlawful marriage with Ernestine Diaz, since deceased: and that the defendant, Marcelline, was the issue of that connection:

That the act of sale, and the marriage contract, and the donation in dowry of the $7,000 note, to which transactions special reference has already been made in this statement, were the result of a conspiracy formed for the purpose of

defeating complainant's rights, and of benefiting, exclusively, the daughter of the unlawful wife:

That the succession of her late husband is indebted to her in the sum of $5,310.

The bill prayed the following relief:

(1.) That the pretended sale and marriage contract be declared null and void:

(2.) That complainant be declared the widow of Cavailhez, and his lawful wife up to the time of his death, and that the marriage between Cavailhez and Ernestine Diaz be declared absolutely null and void:

(3.) That the plantation &c. be decreed to be still the property of the estate of Cavailhez; that complainant be recognized as the owner of one undivided half of the plantation &c., and as a mortgage creditor of Cavailhez, secured on the other half, to the extent of $5,310.

The widow, Remick, answered the bill (pp. 184–186).

The court *decreed*, that the act of sale by Cavailhez and Ernestine Diaz to Clark H. Remick should be *annulled and avoided;* that the act of donation or dowry from Cavailhez and Ernestine Diaz to Marcelline Cavailhez was null and void; that complainant was the lawful widow of Cavailhez, and, as such, *the lawful owner of the undivided half of the plantation &c.;* that Ernestine Diaz never was the lawful wife of Cavailhez; that complainant was entitled to judgment against the estate of Cavailhez for $5,310, with interest &c., secured by a mortgage lien on his estate.

The decree also allows the widow Remick $1,500 on her

reconventional demand for improvements, with right of mortgage or privilege on the property named in the bill.

In furtherance of this decree, complainant was put in possession of the plantation (p. 24).

Upon the death of the Widow Cavailhez, on March 6, 1886 (p. 175), her undivided moiety of the plantation was, by her will, devolved on the plaintiff in error, Chapuis (pp. 190–191).

The other half of the plantation also fell to Chapuis, on June 3, 1889, as purchaser under a sale thereof ordered by the Court having jurisdiction in the matter of the succession of Jean Baptiste Cavailhez, deceased (pp. 222–224).

Thus at the time of the passing of the acts of mortgage of Chapuis securing the debts held by plaintiffs in error Abraham & Son, Chapuis claimed ownership of *the whole* of the plantation in question.

Chapuis having died pending the present suit, his succession is represented by his administrator, J. H. Abraham (p. 10).

We will now briefly refer to the title set up by Lacassagne, the plaintiff below, to the plantation in question.

The plantation, on the death of Remick, was sold as property of his succession and bought by his widow, Marcelline.

She mortgaged the same, on August 22, 1883, to secure one A. G. Maxwell in the sum of $3,488.50, with interest, &c. (pp. 30, 31).

The debt being overdue and unpaid, Maxwell applied for and obtained an order of seizure and sale (pp. 32, 33), in May, 1885, under which the mortgage was foreclosed and the plantation sold to Maxwell and Lacassagne, on August 15, 1885 (pp. 25–27), and, thereafter, to wit, on October 25,

1885, Lacassagne purchased Maxwell's interest, and the same was conveyed to him (pp. 27, 28).

On April 15, 1885, Lacassagne filed a bill in equity in the United States Circuit Court for the Western District of Louisiana against Francois Chapuis, in his own right and as testamentary executor of the Widow Jeanne Caroline Cavé Cavailhez (pp. 150–154).

The bill attacks the validity of the decree in the suit of the Widow Cavailhez against the Widow Remick and her children, on the ground, that complainant and Maxwell were not parties to it; that the Widow Cavailhez falsely described herself as a citizen of France, she being a citizen of Louisiana, and, consequently, that the Court had no jurisdiction of her bill; that the writ of possession under which the Widow Cavailhez was put in full possession of the plantation was unwarranted by the decree, and, therefore, void; that complainant, Lacassagne, was in possession of the property by his laborers, servants, and employés at the time said writ of possession was executed, and still claims to be in possession, although deterred from entering upon said property by Chapuis' agent.

The bill prays that Chapuis may be enjoined from interfering with complainant's possession; that the decree in favor of the Widow Cavailhez be adjudged wholly void, or, at least, void as to complainant; that the possession of Chapuis and his agent be adjudged void, and that they be ordered to vacate the property.

The bill, coming on for hearing on a demurrer for want of equity (p. 155), was dismissed (p. 168); whereupon, an appeal was allowed and perfected to this Court (pp. 168–171), where the decree below was *affirmed*, with the qualification,

however, that it should be without prejudice to an action at law (144 U. S., 119).

In the principal case, against Abraham & Son and Chapuis, the court of first instance, on April 7, 1894, sustained the exceptions of *res judicata*, and adjudged "that plaintiff's demand be, and the same is hereby, rejected and his suit dismissed at his costs" (pp. 45, 46) for the reasons stated in the record (pp. 37–41).

From that judgment an appeal was taken to the State Supreme Court, where, on March 23, 1896, the judgment was reversed and the cause remanded for trial on the merits (pp. 118–121), Mr. Justice Breaux dissenting (p. 122).

Thereafter, the cause, being then on the merits and at large, was brought to issue by the answer of Abraham & Son (133–134), filed on December 15, 1897. This answer adopts the allegations and defenses set up in the answer, or petition of intervention, of Armand Moulor, administrator &c. (pp. 126–129), with the exception of certain averments therein contained, which it is unnecessary to refer to specially.

On April 17, 1897, Public Administrator Zengle, as administrator of the succession of the Widow Cavailhez, intervened for the protection of the community rights of that succession (pp. 124–126).

And, on the same day, Armand Moulor, administrator of the succession of Jean Baptiste Cavailhez, filed an intervention (pp. 126–129).

On November 26, 1897, the Widow Remick filed her petition of intervention (pp. 130–131).

The answers and petitions of intervention, after reiterating the former exceptions of *res judicata*, set up, seasonably and for the first time, the decree of the Circuit Court of the

United States, in the suit of revendication in chancery instituted by Lacassagne against Chapuis, dismissing the bill, and the affirmance of that decree by this court (144 U. S., 119), as conclusive against Lacassagne, and as necessitating the dismissal of the present suit.

The cause having come on for trial and hearing on the merits and on the new defense of *res judicata*, judgment was again rendered by the trial court for defendants, Abraham & Son (pp. 240, 241), for the reasons stated in the record (pp. 238–240).

FINAL JUDGMENT OF THE STATE SUPREME COURT.

From this judgment there was an appeal to the Supreme Court of the State, where the judgment of the trial court was reversed on March 20, 1899, the court, at the same time, proceeding to render such judgment as should have been entered by the court below, Mr. Justice Breaux dissenting (p. 247; *Opinion of Court at pp. 248–253*).

WRIT OF ERROR.

It is to have this judgment reviewed and reversed that the present writ of error was sued out, the same having been duly allowed on petition (pp. 253–255).

ASSIGNMENT OF ERRORS.

Errors are assigned in the record (pp. 255–256) as follows:

> And now into court come H. Abraham & Son and the other petitioners for writ of error herein and assign as error the following:
>
> 1. That this court erred in overruling the peremptory exception of *res judicata* set up by defendants against the demands of the plaintiff, which was based upon two decrees of the circuit court of

the United States specially pleaded in this case, one of which decrees was in the matter of Laurent Lacassagne *versus* F. Chapuis, executor, &c., was taken by appeal to the Supreme Court of the United States and there affirmed in favor of the petitioners herein and against said Lacassagne; that said decree of the Supreme Court of the United States maintained the writ of possession by which the said Lacassagne was ejected from the possession of the property in controversy in this case and petitioners put in possession thereof.

2. That this court erred in holding that said defenses were without effect against the said Laurent Lacassagne and his legal representatives.

ARGUMENT.

The Supreme Court of Louisiana, in its first opinion (pp. 117–122), declined to give *any* effect to the judgment of the Circuit Court of the United States for the Western District of Louisiana, as against the defendant in error, the administratrix of the succession of Laurent Lacassagne, and, in its second opinion (pp. 248–353), declined to accept the conclusions of this court in the case of Lacassagne *vs.* Chapuis (144 U. S., 119), and adhered to its first opinion.

On the first trial, the court of first instance sustained the peremptory exceptions of estoppel and *res judicata*, and on the second trial the judge *ad hoc* declined to accept the conclusions of the State Supreme Court and followed those of this Court in the above-cited case, for the following reasons:

> We have always respected the opinions and the judgments of our honorable State supreme court, and were not this case appealable to a higher court we would submit to the aforesaid opinion of our superior, but when we feel convinced that our own superior court will be reversed by the honorable Supreme Court of the United States on a writ of error to the State supreme court, it becomes our duty to render a judgment in accordance with the plain letter of article number 2453 of the Revised Civil Code of Louisiana, and to decree that the sale of the property in dispute to L. Lacassagne by the sheriff of Vermilion parish, Louisiana, under

the foreclosure proceedings before this court of Maxwell *vs.* Widow C. H. Remick, *and* is null and void, because it was made during the pendency of the suit of J. B. Cavailhez *vs.* Mrs. C. H. Remick before the U. S. circuit court for the western district Louisiana, in direct violation of article 2453 of the R. C. C. of La., 1870. Opinion of the U. S. Supreme Court in L. Lacassagne *vs.* Francois Chapuis, ex. This court considers that in so doing it is far more equitable than if it contained [sustained?] the validity of the sale aforesaid, for if the creditor has the right to execute his mortgage when it is due the third possessor certainly has the right to pay the mortgage up to the day of sale. Now, if the creditor, Maxwell, had waited to foreclose until after the final judgment was rendered in the suit of Cavé *vs.* Widow C. H. Remick, he would have lost none of his rights as creditor. The title to the land mortgaged being quieted, the land certainly would have brought more if sold at auction, and the debtor as well as Chapuis or Cavé would have been benefited. Again, can the honorable court say that the successful wife would not have found means to pay this mortgage, and thus save the property? We say, therefore, that this decree of ours is just and equitable (pp. 238–239).

Here then is a clear federal question, this Court having cided that the question whether a State Court has given e effect to the judgment of a Court of the United States a question arising under the Constitution and laws of the ited States (Crescent Live Stock Co. *vs.* Butchers' Union, 0 U. S., 141–146), and one which may be brought to this urt for revision (Dupasseur *vs.* Rocherau, 21 Wall., 134; nbry *vs.* Palmer, 107 U. S., 3).

The determination of the question presented by this writ error involves the interpretation of article 2453 of the vil Code of Louisiana, which is as follows:

> Art. 2453. The thing, claimed as the property of the claimant, cannot be alienated, pending the action, so as to prejudice his right. If judgment be rendered for him, the sale is considered as a sale of another's property and does not prevent him from being put in possession by virtue of such judgment.

It will be remembered that Lacassagne claims title under the order of seizure and sale foreclosing the widow Remick's mortgage to A. G. Maxwell; that he and Maxwell purchased the plantation at that sale; and that, subsequently, Lacassagne bought Maxwell's interest, and now claims absolute ownership of the property.

As has been stated, the order of seizure and sale was obtained in May, 1885 (pp. 32-35), and executed in July following (p. 26), and, consequently, the proceedings took place during the pendency of the chancery suit in revendication brought by the widow Cavailhez against the widow Remick and her children, which was brought in the United States Circuit Court on March 5, 1884, and closed by a final decree on January 11, 1886.

The Maxwell mortgage was dated August 22, 1883, and recorded the same day.

Now the suit of the widow Cavailhez against the widow Remick having resulted in favor of the former, it is manifest that if the foreclosure sale to Maxwell and Lacassagne was within article 2453 of the Civil Code, it was null and void, "as the sale of another's property," and, of course, no obstacle whatever to the enforcement of the decree of the United States Circuit Court, establishing the right of the widow Cavailhez, in community, to the undivided half of the plantation.

We begin the discussion upon the effect of article 2453 on the foreclosure sale, by an examination of the opinion of this Court in the case of Lacassagne *vs.* Chapuis (144 U.S., 119), which, we think, settles this controversy.

The object of that suit, which was in equity, against Chapuis, who, as already stated, stood in the place of the

widow Cavailhez, or Cavé, was to have her decree against the widow Remick declared wholly void for want of jurisdiction in the Circuit Court, owing to the alleged falsity of the averment in the bill that the widow Cavailhez was a citizen of France, or, at least, that it and the process under it should be declared void as to him, Lacassagne, because he was no party to the decree and could not be legally affected by it, in any way, although he had been dispossessed by its enforcement.

The case was heard by the Circuit Court on demurrer for for want of equity in the bill, and the bill was dismissed absolutely.

Undoubtedly, the bill filed by Lacassagne presented a matter of equitable cognizance, in so far as it averred possession in him and prayed that the decree complained of and the process under it should be declared void, and it became the duty of the Circuit Court and of this Court, on appeal, to determine whether the relief asked for should be granted. In deciding that question, this Court held that the decree should be affirmed: first, because the objection as to the citizenship of the widow Cavailhez could not be raised in the way taken; secondly, that the point made by Lacassagne that he was not a party to the decree was not sustainable, because he was bound by the decree against the widow Remick, on the ground that he "undertook to acquire rights in the plantation under Marcelline Cavailhez, by the sheriff's deed, to the prejudice of the widow Cavé; and his possession, so far as it affected the latter, was the possession of Marcelline Cavailhez [widow Remick], and the writ was properly issued and executed;"

and then the Court proceeded to quote article 2453, in support of its conclusion (p. 124).

It will be perceived, then, that what this Court said about the binding effect of the decree against the widow Remick was *necessary to the proper decision of the only question of equitable cognizance mentioned in the bill*, and that, if this Court had been of opinion that the point was well taken, it might have been its duty to declare the decree and the process under it null and void as to Lacassagne.

But this point having been determined adversely to Lacassagne, all that was left of his bill was the complaint that his possession had been irregularly and improperly disturbed by the process of the Circuit Court under which the widow Cavailhez, or Cavé, was put in possession. But this Court, being of opinion that he was entirely out of possession of the plantation, held that he could not be reinstated therein by means of the writ of injunction, which could not be used for that purpose, and that his true relation to the process attacked was that of "a third opposition," which is a summary proceeding at law that must be instituted in the Court whose process is complained of, in obedience to section 397 of the Code of Procedure (Ed. 1894), which declares:

> This opposition must be made before the Court which granted the order of seizure or the judgment in virtue of which the provisional seizure has been effected (Berard *vs.* Young, 26 A., 598; Lobdell *vs.* Union Bank, 8 A., 117; Adams *vs.* Dannis, 29 A., 320; Freeman *vs.* Howe, 24 How., 453; Buck *vs.* Colbath, 3 Wall., 334; Rio Grande R. R. Co. *vs.* Gomila, 132 U. S., 478).

But the present suit, so far from being one of that character, is an attempt of a State Court to undo what has been done by the Circuit Court and this Court; in short, it is a

blow aimed at the independence of the federal judiciary, as well as a violation of judicial comity.

The present suit is, substantially, a repetition of the one decided by this Court in favor of Chapuis, and consequently Abraham & Son, who claim under Chapuis, are entitled to the protection of the decree which this Court declared binding on Lacassagne. And touching that decree, it may be further said, that Lacassagne, when he bought, had knowledge of the suit in which it was rendered and refrained from becoming a party thereto (Intervention of Widow Remick, p. 131; Interventions of Zengle, p. 125, and of Moulor, p. 125); and the following passage from the writ of possession, under which the Marshal put the widow Cavailhez in possession of the plantation, shows that the decree it was to enforce was rendered with a view to the illegal foreclosure proceedings set on foot by Maxwell:—

> You are hereby ordered and commanded to eject defendant and *those who may be holding said property described as aforesaid under the said defendant by private deed of transfer or otherwise since the institution of aforesaid suit*, to wit, March 5, 1884, *and during the pending of said suit*. (p. 24.)

Plainly then the meaning and effect of article 2453 have passed, irrevocably, into the domain of the thing adjudged, and no question upon either can be again stirred by the parties hereto.

This Court, in affirming the decree of the Circuit Court, did so with the qualification, that it should be "without prejudice to an action at law;" not, however, to an action at law to be instituted to *overturn what this Court had established*, but to "*lawful proceedings*" to enforce the mortgage,

in lieu of those which this Court declared illegal and abortive.

Logically, the reservation in the decree can be understood in no other way than as referring to new foreclosure proceedings under the mortgage, to which proceedings the decrees of the Circuit Court and this Court would be no bar. No other proceeding remained open to Lacassagne, who, by virtue of his purchase from Maxwell, must, it would seem, be considered owner of the debt and mortgage, that being the legal effect of the transactions between the two.

But if there was any other proceeding at law to which this Court could have referred in the reservation in its decree it was that of a third opposition, in which it might be open to Lacassagne to apply to the Circuit Court to modify the process under which the widow Cavailhez, or Cavé, had been placed in possession so as to restrict its operation to her community moiety of the plantation, which was the extent to which she was adjudged to be entitled thereto.

The meaning of article 2453 being thus established in this litigation, its effect, as interpreted, was to conclude Lacassagne by the decree rendered against the widow Remick at the suit of the widow Cavailhez. When he bought, it was with full knowledge that a decree against the widow Remick would bind and conclude him as fully as though it had been rendered directly against him. Clearly, then, he cannot evade the conclusiveness of this decree in any other controversy between the same parties or their privies. It follows, therefore, that the plea of the thing adjudged is a complete bar to the present suit.

But it is by no means open to Lacassagne or his succession to contend here that he cannot be affected by the decree ob-

tained by the widow Cavailhez, or Cavé, against the widow Remick, because not a party thereto. Having, as we have seen, assailed that decree as void against him in the suit against Chapuis, and this Court and the Circuit Court having decided, in that suit, that he was bound by the decree, it is manifest that he is as much concluded by it as if he had been a party to it originally.

THE EFFECT OF THE DECISIONS OF THE STATE SUPREME COURT.

The suits between the Widow Cavailhez and the Widow Remick, and between Lacassagne and Chapuis, and between Lacassagne and Abraham & Son and Chapuis are parts of one and the same litigation, and the jurisdiction of the United States Circuit Court having first attached to the subject-matter of the litigation, the decision of that court as to the effect of article 2453, affirmed by this Court, became a thing adjudged between the parties to this litigation and should have been followed and supported by the State Supreme Court, however widely that court might have differed in opinion from this Court and the Circuit Court. Supposing, for the sake of argument, that the decisions of the Circuit Court and of this Court were erroneous, they had become consecrated by the principle of *res judicata*, and should have been enforced by the State Court as importing absolute verity between the parties and their privies. *Res judicata pro veritate accipitur.* As this Court has said, that principle is so deeply implanted in the jurisprudence of Louisiana that commentators upon that jurisprudence have said, that *res judicata* "*renders white that which is black, and straight that which is crooked. Facit ex curvo rectum, ex albo nigrum.*" (Jeter *vs.* Hewitt *et al.*, 22

How., 352, 364.) By thus submitting to and enforcing the principle of *res judicata*, the State Supreme Court would not have been committed, in any way outside of this suit, to the interpretation placed on article 2453 by this Court.

The attempt, therefore, of the State Supreme Court to show that this court and the Circuit Court were wrong in their interpretation of article 2453 of the Civil Code was, we submit, with great respect, irrelevant to the question here raised by the exceptions of *res judicata* and estoppel.

THIS COURT WILL NOT RECEDE FROM ITS OPINION.

It is perfectly evident from the opinions of the State Supreme Court that the effect of article 2453 upon executory process under a mortgage was a question of the first impression, in that court, when raised in this suit. At the time, therefore, when this Court and the Circuit Court decided the question, they were without the guidance of any state decision, and compelled to determine it for themselves; and the simple question is, Will this Court, on this writ of error, recede from its position and adopt and enforce the contradictory and subsequently declared views of the State Supreme Court?

As a general proposition, this Court will follow decisions of state courts interpreting their own laws. But there are well recognized exceptions to the rule. One of them, in the language of this Court, is: "When this Court have first decided a question arising under state laws, we do not feel bound to surrender our convictions on account of a contrary subsequent decision of a state court, as in the case of Rowan *vs.* Runnels, 5 How., 139." (Pease *vs.* Peck, 18 How., 395,

398, 399; Burgess *vs.* Seligman, 107 U. S., 20, 33, 34.) In Morgan *vs.* Curtenius (20 How., 1, 3), it was accordingly held that a decision of a state court could not have the effect of making a prior decision of a Circuit Court of the United States erroneous, which was not so when the judgment of that court was given.

It is to be considered that if this Court should follow the decisions of the State Supreme Court in this case it would be to cut down and destroy the rights that vested under the decree rendered by the Circuit Court in the case of the widow Cavailhez *vs.* the widow Remick, in the very litigation of which the present case forms a part. Surely we may assert, with some confidence, that this Court will not surrender its independent judgment, in submission to the general rule, where such injustice and contrariety would be the result. (Town of Roberts *vs.* Bolles, 101 U. S., 119; Carroll County *vs.* Smith, 111 U. S., 556; Block *vs.* Bourbon County, 99 U. S., 686; and Pease *vs.* Peck, and the other cases cited *supra.*)

These cases show that this Court is generally averse to relinquishing its opinion in any case upon a question of state law where it is not convinced by the reasoning of a subsequent conflicting opinion of the state court.

In this case, we submit with deference, the reasoning of the State Supreme Court as to the meaning and effect of article 2453 is not convincing.

The ground on which that Court held that this article had no effect on the foreclosure proceedings under the Maxwell mortgage was that the mortgage was made and recorded before the suit by the widow Cavailhez *vs.* the widow

Remick was brought in the Circuit Court, and that no subsequent suit could cut off the right of the creditor to foreclose it.

But the act of mortgage created, at best, merely a lien on the property in favor of Maxwell. In a word, a mortgage under the Code is a species of pledge, with this difference, that it is not necessary that the mortgagee should have actual possession. (C. C., art. 3280, 3281.) Now a pledge is a mere security, implying no title in the thing pledged. In both pledge and mortgage it requires a subsequent act to transfer and divest the owner's title. According to the code the mortgage gives the creditor "the power of having the property seized and sold in default of payment." (C. C., art. 3278.)

If then Lacassagne's right was limited to a mere *lien* on the plantation, is it reasonable to say, that, because this alleged *lien* was created before the widow Cavailhez instituted her suit in the Circuit Court against the widow Remick, therefore, the executory process, under which the plantation was *sold and conveyed* to Maxwell and Lacassagne, was not an "*alienation*" pending that suit, within the meaning of article 2453? The article in question embodies the familiar maxim, that while a suit is in progress the *status* of things must be preserved against every attempt to change it. *Pendente lite nihil innovetur.* Indeed, the effect of the article is the same as that of the pact *de non alienando* in a mortgage governed by the law of Louisiana. It is difficult, therefore, to see how, with any attention to the meaning of the article, the attempted transfer of title by executory process from the widow Remick to Maxwell and Lacassagne could have failed,

if operative, to change materially the *status* of the plantation, as to the widow Cavailhez.

In its reference to the contention, that the priority in date of the mortgage to the institution of the suit prevented the application of article 2453, this Court said:

> The fact that the plaintiff and Maxwell were mortgage creditors of Marcelline Cavailhez [Remick], and that their mortgage was duly recorded in the mortgage office of the parish, before the suit brought by the widow Cavé was instituted, IS OF NO CONSEQUENCE, SO FAR AS THE PRESENT SUIT IS CONCERNED (p. 125).

The learned state court seems to be mistaken in supposing that the effect of applying the article to this case would destroy the security of the mortgage. As this Court has said, the effect of such application was merely to invalidate the proceedings of seizure and sale, *leaving the mortgage, if valid, still valid*, with the right to institute "*lawful proceedings*" on it.

The state court seems to be mistaken also in holding that this Court dismissed Lacassagne's bill for want of jurisdiction, and so did not really decide anything else. This, we have endeavored to show, is not correct. The relief prayed in the bill being to some extent equitable in character, the Court must needs have decided the case, to that extent, on the merits; otherwise the decree of dismissal would have been explicitly for want of jurisdiction. Indeed, this Court say that the Circuit Court "*had authority to make a decree on the merits*,"—language which appears to be repugnant to the theory of the state court as to the scope of this court's opinion.

It appearing, therefore, that the state court has refused to

give the effect to the decrees in question to which they are entitled under the jurisprudence of the state, as held by this Court and the Circuit Court, it is submitted that the judgment of the state court should be reversed.

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ALBERT VOORHIES,
W. O. HART,
For Plaintiffs in Error.

WASHINGTON, D. C., 1505 PENNA. AVE., *April* 16, 1900.